while diminishing those of the home country. England applies the doctrine to appeals by a plaintiff who has become an alien enemy since judgment. *Porter* v. *Freudenberg*, [1915] 1 K. B. 857. But where the judgment directs payment to the alien property custodian, our resources will not go to Germany and there seems no valid reason for refusing to settle the rights of the parties. See *Rothbar* v. *Herzfeld*, 179 App. Div. 865, 869, 167 N. Y. Supp. 199, 202. Even in the absence of an alien property custodian, it has been held that a plaintiff who has become an alien enemy since judgment can appeal. See *Taylor* v. *Albion Lumber Co.*, 176 Cal. 347, 352, 168 P. 348, 350. At any rate, the result of the principal case is a necessary one, because it is a loyal defendant who is seeking relief in the Appellate Court. *Owens* v. *Hanney*, 9 Cranch (U. S.), 180.

WATERS — NAVIGABILITY — NECESSITY OF ACTUAL USER. — By the act of 1890 Congress prohibited the building of any dams across navigable waters of the United States without authority of the Secretary of War. (26 STAT. AT L. 454.) The defendant company constructed a dam across the Desplaines River in Illinois without obtaining such authority. The United States filed a bill of complaint seeking its removal and an injunction against further action. The evidence showed that the river had been used by fur traders with canoes and flatboats as late as 1830. Since then, however, due to natural obstacles to navigation and the construction of a canal near-by, it had not been used for commerce. *Held*, that the relief be granted. *Economy Light & Power Co.* v. *United States*, 256 Fed. 792 (Circ. Ct. App.).

Navigable waters of the United States are those which form, by themselves, or by their connections with other waters, a continuous channel for commerce with foreign countries or among the states. *The Daniel Ball*, 10 Wall. 557; *Miller* v. *Mayor of New York*, 109 U. S. 385. Navigability does not depend on the character of the craft, however propelled, or the nature of the commerce. *The Montello*, 20 Wall. (U. S.) 430; *Heyward* v. *Farmers' Mining Co.*, 42 S. C. 139, 19 S. E. 963. It is not necessary to prove long and continuous user nor adaptability for commercial use during all the seasons of the year. *Moore* v. *Sanborn*, 2 Mich. 519; *Lewis* v. *Coffey County*, 77 Ala. 190. *Cf. State* v. *Gilmanton*, 14 N. H. 467, 480. A stream is not rendered non-navigable because of temporary obstructions or because of difficulties caused by natural barriers such as rapids and sand bars. *The Montello*, *supra; Atty. Genl.* v. *Harrison*, 12 Grant, Ch. 466. But a stream not naturally navigable cannot be made so by artificial means so as to deprive riparian owners of their vested property rights. *Yates* v. *Milwaukee*, 10 Wall. 497; *Murray* v. *Preston*, 106 Ky. 561, 50 S. W. 1095. A navigation which is temporary, precarious, and unprofitable is insufficient. *Harrison* v. *Fite*, 148 Fed. 781; *North American Co.* v. *Mintzer*, 245 Fed. 297. The true criterion is one of sound business common sense, — natural useful capacity as a public highway of transportation. *Little Rock, etc. R. R.* v. *Brooks*, 39 Ark. 403. It would seem clear that the power of Congress under "the commerce clause" extends to potential agencies of interstate commerce, regardless of their actual usage, and to the preservation of natural highways for the public. Accordingly the principal case seems correct despite the contrary decision reached by the Illinois Supreme Court in regard to the identical situation. See *People* v. *Economy Power Co.*, 241 Ill. 290, 89 N. E. 760.

WILLS — REPUBLICATION — INCORPORATION BY REFERENCE — VALID CODICIL REFERRING TO WILL PROCURED BY UNDUE INFLUENCE. — The testator made a holographic will and some years later a holographic codocil referring to his will. The jury found that the will was procured by undue influence but that the codicil was valid and not so procured. *Held*, that both

the will and the codicil be admitted to probate. *Taft* v. *Stearns*, 125 N. E. 570 (Mass.).

A valid testamentary instrument may be made to speak as of a later date by a codicil. *Goods of Truro*, L. R. I. P. & D. 201. Moreover, in most jurisdictions any existing writing may be made part of a will by an express reference to it in the will. *Allen* v. *Maddock*, 11 Moo. P. C. 427. It is often immaterial whether a will or codicil is considered as republished by a later codicil, or as incorporated by reference. See *Ingoldby* v. *Ingoldby*, 4 Notes of Cases, 493; *Gordon* v. *Lord Rea*, 5 Sim. 274. But to preserve accuracy of terminology, a distinction might be drawn as follows: Any document that was once the valid will or codicil of the testator is republished; all other documents are incorporated by reference. The last named class would thus include wills made by married women, infants, and lunatics, wills procured by fraud, duress, or undue influence, as well as documents not properly executed. Accordingly, the court in the principal case should have spoken only of incorporation by reference and not of republication. The result reached by the court is undoubtedly correct. *Pope* v. *Pope*, 95 Ga. 87, 22 S. E. 245. *Cf. Taylor* v. *Kelly*, 31 Ala. 59.

WITNESSES — PRIVILEGE OF HUSBAND AND WIFE — USE FOR PURPOSE OF IMPEACHMENT OF TESTIMONY OBTAINED IN VIOLATION OF PRIVILEGE. — A wife testified in favor of her husband, who was the defendant in a criminal prosecution. For the purpose of impeachment the state introduced one of the grand jurors, who testified that the wife had made prior inconsistent statements before the grand jury, and who related what she had said on that occasion. *Held*, that this testimony should not have been received. *Doggett* v. *State*, 215 S. W. 454 (Tex.).

Two distinct common-law doctrines have often been confused: the disqualification of one spouse as a witness for the other; and the privilege of one not to be testified against by the other. See WIGMORE, EVIDENCE, §§ 600, 601, 2228, 2333, 2334. Statutes have almost universally removed the disqualification but the privilege generally remains. *Talbot* v. *United States*, 208 Fed. 144. The courts, nevertheless, sometimes deal with the matter on the assumption that a spouse is incompetent to testify against the other except in criminal actions against one for injury to the other. *Barber* v. *People*, 203 Ill. 543, 68 N. E. 93; *Brock* v. *State*, 44 Tex. Cr. Rep. 335, 71 S. W. 20. On the theory of incompetency the instant decision is obviously correct. But it seems more desirable as well as more accurate to regard the matter as simply one of privilege. A privilege connotes the possibility of waiver, so that by calling his wife as a witness for him the husband should be regarded as waiving this privilege not to have her testify against him. *National German-American Bank* v. *Lawrence*, 77 Minn. 282, 80 N. W. 363. Thus, when a wife testifies for her husband, she may ordinarily be impeached in the same manner as any other witness. *Bell* v. *State*, 213 S. W. (Tex.) 647. But a present waiver cannot, of course, cure any violations of the privilege in prior proceedings. And since the statements which, in the principal case, the wife made to the grand jury were improperly obtained in violation of the privilege, proper protection of the privilege demands that their use thereafter be prohibited even for purposes of impeachment. *Johnson* v. *State*, 66 Tex. Cr. Rep. 586, 148 S. W. 328. The decision is therefore not inconsistent with the theory of privilege.